SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~1314~~ 136
1966

RICHARD H. M. SWANN
and
SUPERVISOR OF ELECTIONS
of Dade County, Florida

Appellants,

vs.

TOM ADAMS, Secretary of State of Florida;
E. L. GATES, Supervisor of Registration of
Broward County, Florida; and
W. B. FREEMAN, Supervisor of Registration of
Monroe County, Florida

Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal—the third addressed by the same Appellants to the Supreme Court of the United States in this cause—taken by Appellants Richard H. M. Swann and the Supervisor of Elections of Dade County, Florida, from an order of the United States District Court for the Southern District of Florida entered on March 18, 1966. The District Court held that a legislative apportionment plan enacted by the Legislature of the State of Florida on

March 9, 1966, after this Court's decision earlier this term, met the requirements of the Federal Constitution in all respects, did not deny Appellant Swann or other citizens of Florida due process of law or equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, and therefore refused to enjoin the application of such legislative enactment. This statement is submitted to show that the Supreme Court has jurisdiction of this appeal, that the District Court failed to follow either of the prior judgments of the Supreme Court in this cause (*Swann v. Adams*, 378 U.S. 553; *Swann v. Adams*, 34 U. S. Law Week 3291 (February 25, 1966)), and that substantial questions are presented by this appeal.

OPINIONS BELOW

The opinion and order appealed from, which were entered on March 18, 1966 by the United States District Court for the Southern District of Florida, are unreported. They are printed herein as Appendix B-1. Earlier opinions in this cause are reported as:

(i) *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla., 1962)

(ii) *Sobel v. Adams*, 214 F. Supp. 811 (S.D. Fla., 1963)

(iii) *Swann v. Adams*, 378 U.S. 553. This opinion is printed herein as Appendix B-2.

(iv) *Swann v. Adams*, unreported (S.D. Fla., December 23, 1965); printed herein as Appendix B-3 with appendix thereto deleted.

(v) *Swann v. Adams*, 34 U.S. Law Week 3291, decided February 25, 1966; printed herein as Appendix B-4.

JURISDICTION

Following the reversal of the District Court's opinion and order of December 23, 1965 by this Court on February 25, 1966, the Legislature of Florida was convened in Special Session by the Governor on March 2, 1966. The Legislature so convened was based on the 1963 apportionment, held unconstitutional by this Court almost two years previously. *Swann v. Adams*, 378 U.S. 553. On March 9, 1966 this Legislature enacted HB 17-X(66) reapportioning both houses of the state legislature. The Appellants immediately attacked this plan as failing to meet the rule of *Reynolds v. Sims*, 377 U.S. 533, twice before applied to Florida by this Court (*Swann v. Adams*, 378 U.S. 553; *Swann v. Adams*, 34 U.S. Law Week 3291), and sought to enjoin its implementation under authority of the provisions of Title 42, U.S.C., Sections 1983 and 1988 and Title 28, U.S.C., Section 1343. This appeal is from an opinion and order of the District Court entered on March 18, 1966 at 9:38 A.M. which held that the legislative apportionment met the requirements of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the Federal Constitution in all respects, and which refused to enjoin its use in state pri-

maries scheduled to take place in May, 1966. Notice of Appeal by the Supervisor of Elections of Dade County, Florida, was filed with the Clerk of the United States District Court for the Southern District of Florida on March 25, 1966, and Appellant Swann joined in the appeal on the same day through a separate Notice of Appeal.

The jurisdiction of the Supreme Court to review the opinion and order of the District Court by direct appeal is conferred by Title 28, U.S.C., Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the opinion and order herein appealed from: *Baker v. Carr*, 369 U.S. 186; *Reynolds v. Sims*, 377 U.S. 553; *Swann v. Adams*, 378 U.S. 553; and *Swann v. Adams*, 34 U.S. Law Week 3291.

STATUTES INVOLVED

The constitutionality of HB 17-X(66), Chapter 66-1, Laws of Florida, as enacted by the Legislature of the State of Florida on March 9, 1966 and approved by the Governor of Florida on March 10, 1966, is involved. This enactment is printed herein as Appendix A-1.

QUESTIONS PRESENTED

1. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 in which certain counties are over-represented to the extent of 18.28 percent and certain other counties are under-represented to the extent of 15.27 percent in the House of Representatives,

deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

2. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 in which certain counties are over-represented to the extent of 15.09 percent and certain other counties are under-represented to the extent of 10.56 percent in the Senate, deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

3. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 in which there are deviations from mathematical equality in excess of 15 percent in 7 of the 117 House of Representative Districts, and in which there are deviations from mathematical equality in excess of 10 percent in 29 of the 117 House of Representative Districts, deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

4. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 in which there are deviations from mathematical equality in excess of 14 percent in 6 of the 48 Senatorial Districts, and in which there are deviations from mathematical equality in excess of 10 percent in 12 of the 48 Senatorial Districts, deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

5. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 in which there is a clear pattern of under-representation for the populous urban counties and over-representation for the sparsely settled rural counties in both legislative houses, deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

6. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 and containing the features described in the foregoing questions deny to Appellant Swann, persons represented by Appellant Supervisor,

and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, when the District Court also had before it for consideration an apportionment plan jointly submitted by Appellant Swann and Appellant Supervisor at the invitation of the Court in which there was a maximum deviation from mathematical equality of only 1.95 percent in the House of Representatives and a maximum deviation from mathematical equality of only 3.35 percent in the Senate, and in which all electoral districts were geographically contiguous?

7. Does the refusal of the District Court to declare unconstitutional, arbitrary and unreasonable the reapportionment plan contained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 and containing the features described in the foregoing questions deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, when the Court also had before it for consideration an apportionment plan jointly submitted by Appellant Swann and Appellant Supervisor which, through minor modifications and adjustments to the plan contained in HB 17-X(66), reduced the maximum deviations from mathematical equality from 15.1 percent to 10.6 percent in the Senate and from 18.3 percent to 11 percent in the House of Representatives?

8. Does the refusal of the District Court to declare unconstitutional and enjoin the reapportionment plan con-

tained in HB 17-X(66) enacted by the Legislature of the State of Florida on March 9, 1966 in which three Senators are "grandfathered" or held over from the previous Senate while other Senators are not so "grandfathered" or held over, deny to Appellant Swann, persons represented by Appellant Supervisor, and all other citizens of Florida due process of law or equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

9. Did the District Court err in according a greater presumption of validity to the plan enacted by the Legislature in HB 17-X(66) than to the alternative plans submitted by Appellant Swann and Appellant Supervisor when the plan contained in HB 17-X(66) was enacted on March 9, 1966 by a malapportioned Legislature (still composed of representatives elected under statutes enacted in 1963 and declared unconstitutional by this Court on June 22, 1964) on the eighth occasion on which a malapportioned and unconstitutional Legislature had been convened since this litigation was commenced on March 28, 1962?

STATEMENT OF THE CASE

The antecedent history of the cause is set forth in this Court's decision of February 25, 1966. *Swann v. Adams*, 34 U.S. Law Week 3291. The Governor of Florida issued a call on February 26, 1966 convening a Special Session of the State Legislature on March 2, 1966 to consider reapportionment legislation. The Legislature so called to convene was composed in the manner found unconstitutional by this Court almost two years previously.

Swann v. Adams, 378 U.S. 553. On February 28, 1966 the Appellants filed a joint petition asking the District Court to adopt and put into immediate effect a reapportionment plan prepared by Appellants and previously filed on July 6, 1965 at the District Court's express invitation. This plan was in accord with the size requirements contained in Section 2, Article VII of the Constitution of Florida which states:

> "The Legislature shall consist of not more than 32 members of the Senate and of not more than 68 members of the House of Representatives."[1]

The 32 Senator, 68 Representative plan urged by the Appellants divided the State into 12 Senatorial districts or constituencies and 14 Representative districts or constituencies. Each district created was composed of a single county or a group of contiguous counties. No county was subdivided under the plan, and it met the size limitations imposed by the above quoted section of the Florida Constitution. The plan incorporated almost perfect voter equality with no Senate constituency deviating by more than 3.35 percent from absolute mathematical equality and no House constituency deviating by more than 1.95 percent. In the alternative, the joint petition asked the Court to decree that each member of the Florida Legislature called to convene in Special Session on March 2, 1966, be given a vote weighted in proportion to the number of people in the area from which he was elected, as shown in

[1] The above quoted section of the Florida Constitution has never been repealed. It was superseded by a later enacted section which the Supreme Court of Florida declared unconstitutional in an Advisory Opinion to the Governor appearing at 150 So. 2d 721 (1963) because of the district court's opinion in Sobel v. Adams, 208 F. Supp. 316 (S. D. Fla. 1962).

the 1960 decennial census, in order to compensate for the invalid composition of the Legislature.

On March 1, 1966, the District Court deferred any hearing on the joint petition of the Appellants on the ground that it was without jurisdiction until it received the mandate or judgment based on the Supreme Court's opinion of February 25, 1966.

On March 2, 1966, the Special Session of the Legislature commenced. This session represented the eighth time that an unconstitutionally apportioned legislature had met since this cause was instituted in March, 1962. Just before the Special Session began, the Attorney General of the State of Florida furnished each member of the Legislature with a document entitled "Criteria and Guidelines for Reapportionment as Established by Federal Courts." Therein he stated inter alia:

> "The allowable mathematical percentage variance differs in some of the Supreme Court decisions. However, a study of these decisions reveals that a percentage variance of more than 15 percent would be difficult to sustain as complying with 'one man-one vote.' It is therefore respectfully submitted that a percentage variation not exceed 15 percent."

On March 9, 1966, the Legislature enacted HB 17-X (66), Chapter 66-1, Laws of Florida. This statute, as approved by the Governor on March 10, 1966, is printed herein as Appendix A-1. Salient features of this enactment are the following:

(a) It provides for a Senate of 48 members, and a House of Representatives of 117 members.

(b) In the House of Representatives certain counties are over-represented to the extent of 18.28 percent while other counties are under-represented to the extent of 15.27 percent, a spread of 33.55 percent. There are deviations from mathematical equality in excess of 15 percent in seven of the House constituencies, and in excess of 10 percent in 29 of the House constituencies.

(c) In the Senate certain counties are over-represented to the extent of 15.09 percent while other counties are under-represented to the extent of 10.56 percent, a spread of 25.65 percent. There are deviations from mathematical equality in excess of 14 percent in six of the 48 Senatorial Districts, and in excess of 10 percent in 12 of the 48 Districts. Further, three Senators from unchanged Senatorial Districts are "grandfathered" or held over from the previous Senate, while other Senators similarly situated are not "grandfathered" or held over.

(d) There is a pattern of under-representation for the populous urban counties and over-representation for the more sparsely settled rural counties in both legislative houses.

On March 14, 1966, the Attorney General of the State of Florida moved the District Court to approve HB 17-X (66). On March 15, 1966, the Appellants submitted to the District Court a statistical analysis of HB 17-X(66) pointing out the extent of its departures from mathematical equality, and simultaneously a document entitled "Suggested Modifications to the Plan of Apportionment Contained in HB 17-X(66)." This document showed how the maximum deviations from equality could be reduced from 15.1 percent to 10.6 percent in the Senate and from 18.3 percent to 11 percent in the House of Representatives by minor modifications and adjustments not affecting the overall structure of the apportionment plan adopted by the Legislature.

Oral argument was heard on March 15, 1966. The Attorney General urged the Court to sanction the apportionment plan contained in HB 17-X(66), while counsel for Appellants sought adoption of the joint plan calling for 32 Senators and 68 Representatives originally submitted to the Court on July 6, 1965, or in the alternative, adoption of the suggested minor modifications to HB 17-X(66).

On March 18, 1966, the District Court entered its opinion and order declaring HB 17-X(66) constitutional in all respects and refusing to enjoin its application. It is this Order that the Appellants respectfully ask the Supreme Court to review and reverse.

THE QUESTIONS ARE SUBSTANTIAL

1. On June 15, 1964, this Court in the Reapportionment Cases, 377 U.S. 533-765, established a standard for

apportioning both houses of a bicameral state legislature, in the following terms:

> ". . . we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis."
> *(Reynolds v. Simms*, 377 U.S. 533, 576*)*

> "Overweighting and over-valuation of the votes of those living here has the certain effect of dilution and under-valuation of those living there."
> *(Reynolds v. Simms*, 377 U.S. 533, 563*)*

> ". . . the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."
> *(Reynolds v. Simms*, 377 U.S. 533, 579*)*

> ". . . the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."
> *(Roman v. Sincock*, 377 U.S. 695, 710*)*

Since that date the federal district courts have been charged with the responsibility of enforcing this standard of democratic equality, and this Court has not again

spoken. But during this period the district courts have, perhaps unwittingly, subverted this standard of maximum voter equality into a different standard, the standard of "maximum permissible deviation", a standard that has come to mean an allowable deviation of up to 15 percent. This figure was originally mentioned in *Toombs v. Fortson*, 241 F.Supp. 65 (1965) when the District Court said:

> "We decline to set a mathematical formula to be followed but we do hold that a variance of more than 15 percent would be difficult, if not impossible, to justify. It may be that there will be some later elucidation by the Supreme Court on this complex question but until such event occurs, we will base any test as to the reasonableness of variances on the departure figure of 15 percent." (Page 70)

This standard was again enunciated in *Crawford County Bar Association v. Faubus*, 238 F.Supp. 290, affirmed without opinion by this Court at 34 Law Week 3289. Compare too *Yancey v. Faubus*, ——F.Supp.——, affirmed without opinion ——U.S.——, wherein the District Court stated:

> ". . . the authorities do suggest that a deviation of *not more than* 15 percent either way is tolerable." (Emphasis supplied) See Note, 79 Harv. L. Rev. 1226, 1250.

The creation of this "maximum permissible deviation" was most unfortunate, for immediately the assumption arose among legislators (and district courts) that any deviation not in excess of 15 percent was constitu-

tionally acceptable. As an example of this, see the statement of the Attorney General of Florida to the Florida Legislature, *supra*, page 10. A penumbra of acceptability with only a temporarily defined outer limit has been created. The temporarily defined outer limit may possibly be extended and, if the 15 per cent deviation proves generally acceptable to the courts, perhaps an 18 percent deviation may also be sanctioned. The District Court sanctioned an 18 per cent deviation in this case.

The principle created by this Court is clear: One man, one vote, mathematical equality. Certain other factors are relevant, however, such as respect for county lines, contiguity of districts, and state constitutional standards as to the size of legislative houses. It must be recognized that these relevant factors will create deviations from mathematical exactness, but only such minimal deviations as necessity requires should be tolerated.

A plan was presented to the District Court by the Appellants on July 6, 1965, satisfying all relevant non-population considerations and deviating from perfect equality by only 3.35 percent in one house and 1.95 percent in the other. This plan was before the Florida Legislature when it met in Special Session after this Court's decision of February 25, 1966. And this plan was again before the District Court when it issued its decision of March 18, 1966, herein appealed from. But the District Court rejected this plan and approved as constitutional in all respects a plan with deviations extending even beyond the *Toombs v. Fortson* "maximum permissible deviation" of 15 percent.

This appeal presents to the Court a unique opportunity to make clear that its *Reynolds v. Sims* standard

must be followed and that there is no maximum permissible deviation. When the District Court has before it a plan which satisfies all relevant nonpopulation considerations and deviates from perfect equality only minimally, it may not adopt a plan *with deviations 5 times as great* without a clear and precise explanation as to its reason for rejection of the former and acceptance of the latter. Without a statement of such reason, this Court is not even given the material which it requires to properly exercise its function of judicial review.

2. Appellants submit that, even if the rule providing for a maximum permissible deviation of 15 percent declared in *Toombs v. Fortson*, 241 F.Supp. 65 (1965) were to be approved by this Court, the reapportionment plan contained in HB 17-X(66) as enacted by the Florida Legislature on March 9, 1966, would still be unconstitutional as beyond the bounds of that rule.

One of the clearest and most forthright statements of the legal requirements of a constitutional apportionment plan is to be found in the opinion of the District Court of December 23, 1965 where, in holding the plan enacted by the Legislature in June of 1965 unconstitutional, the Court said in attempting to lay down valid criteria for the guidance of a future legislature:

> "In affording a further opportunity to the Florida legislature to adopt a constitutionally acceptable apportionment, we have the confident hope that there will be a recognition, by the legislative bodies, of the paramount necessity of conforming to the constitutional requirement that 'both houses of a state legislature must be apportioned on a population basis,' and that the 'state make an

honest and good faith effort to construct districts in both houses of its legislature, as nearly of equal population as is practicable.' Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506. *Precise exactness cannot, of course, be achieved but only such minimal departures as necessity demands will be permitted. Variations are to be sanctioned only when they cannot be avoided.* We do not think it can be assumed that the fifteen percent variance allowed in Toombs v. Fortson, N.D.Ga.1965, 241 F.Supp. 65, establishes a rule of tolerance that will be followed as a legal principle. If the Florida legislature does not adopt a valid plan of apportionment then this Court must do so." (Emphasis supplied)

An abyss lies between these unequivocal words of the District Court and its sanction of the legislature's plan of apportionment in which the maximum deviation in the House of Representatives exceeds 18 percent, the maximum deviation in the Senate exceeds 15 percent, and the number of deviations in excess of 10 percent exceeds 25 percent of the number of seats in each legislative house. The legislative plan fails to meet even the constitutionally dubious tenets of *Toombs v. Fortson*, 241 F.Supp.65 (1965).

Nor can it be argued that the departures from mathematical equality contained in the legislative enactment represented "only such minimal departures as necessity demands." These departures are neither minimal nor demanded by necessity. This is demonstrated by the joint plan of the Appellants in which there was a maximum deviation of only 3.35 percent in one house and 1.95 per-

cent in the other house. It was also demonstrated by the fact that Appellants were able to reduce the maximum deviations in the plan enacted from 15.1 percent to 10.6 percent in the Senate and from 18.3 percent to 11 percent in the House of Representatives, with only slight adjustments and without affecting the basic structure of the plan.

3. In the legislative plan enacted on March 9, 1966 three Senators were "grandfathered" in or held over from the previous Senate.[2] These three Senators were from constituencies that were unchanged geographically from those existing in the previous apportionment plan. There were other Senators who were not "grandfathered" in, whose terms had not expired under the previous apportionment plan and whose constituencies remained geographically unchanged under the newly enacted plan. Retaining some Senators and not retaining others similarly situated is a violation of the equal protection of the laws clause of the Fourteenth Amendment. This difference in treatment was not part of a considered plan of staggered elections. It was ad hoc personal legislation. It denied to the voters of those Senatorial Districts whose Senators were "grandfathered" the right to elect possessed by all other Florida voters.

4. There is a pattern of under-representation for the populous urban counties and over-representation for the more sparsely settled rural counties in both legislative houses as constituted under HB 17-X(66). This is shown by basic facts that are not and cannot be disputed. Although the opinion of the District Court under review specifically held to the contrary, the Appellants respectfully

[2] These were the Senators from Orange, Palm Beach and Polk Counties.

submit that the District Court failed to take the following into account in reaching its erroneous conclusion:

(a) The only counties in the Senate under-represented by 10 percent or more are two large urban counties. These are Duval County which includes the city of Jacksonville, and Palm Beach County which includes the cities of West Palm Beach and Palm Beach. These two counties are by population the second and seventh largest in Florida, and together contain almost three-quarters of a million persons.

(b) In the House of Representatives, there are 13 members who are to be elected from constituencies under-represented by 10 percent or more. Of these 13, 10 will represent essentially urban areas. These include Orange County, which contains the city of Orlando, and Polk County, which contains the city of Lakeland. These two counties are by population the sixth and eighth largest in Florida, and have a combined population in excess of 450,000 persons.

(c) Urban Palm Beach County, with a population of over a quarter of a million persons, is seriously under-represented in both legislative houses. This County is under-represented by 10.6 percent in the Senate, as has been previously pointed out; in addition, the County will be under-represented by 7.8 percent in the House of Representatives.

See *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, in which the Court said:

> " . . . disparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may therefore render the apportionment scheme at least constitutionally suspect."

(d) Of the 20 counties which are over-represented in the House of Representatives by 10 percent or more, 19 are rural in character[3] and only one, Brevard County which includes the Cape Kennedy complex and the surrounding cities and towns, is urban.

(e) There are three counties which are over-represented by 10 percent or more in both legislative houses. The three counties are Walton and Holmes Counties which are both over-represented by 15.1 percent in the Senate and 11 percent in the House, and Washington County, over-represented by 14.4 percent in the Senate and 11 percent in the House. All three of these counties are rural, with Walton County, having a population of just over 15,000 persons, being the largest of the three. See *Lucas v. Forty-Fourth General Assembly, supra.*

[3] These 19 counties are: Holmes, Walton, Washington, Jefferson, Dixie, Taylor, Levy, Gilchrist, Putnam, Alachua, Union, Bradford, Clay, Flagler, St. Johns, Lake, Seminole, Pasco, and Manatee.

(f) There are two rural counties heavily over-represented in the overall picture. Manatee County, an essentially rural county on Florida's west coast, is over-represented by 18.3 percent in the House of Representatives and 7.2 percent in the Senate. In addition, rural Gulf County, with a population of under 10,000, is over-represented by 14.4 percent in the Senate and 8.9 percent in the House of Representatives.

These instances manifest a pattern of discrimination against urban areas. The District Court's abrupt dismissal of the issue on the ground that HB 17-X(66) did "not discriminate *to any great extent* (Emphasis supplied) against any section of the state or against either rural or urban interests" was error.

ABUSE OF DISCRETION

The District Court obviously attached a presumption of validity to the plan enacted by the Legislature as HB 17-X(66). Only by resort to such a presumption can the District Court's rejection of both the joint plan submitted by Appellants and of the modifications alternatively suggested by Appellants to HB 17-X(66) be explained. Why else accept the Legislature's plan in totality despite the much closer adherence to the "one-man, one-vote" principle of the joint plan or proposed modifications submitted by Appellants? No other explanations or justifications for the wider deviations contained in HB 17-X(66) were offered to the District Court or stated by it.

Appellants respectfully submit that indulgence in such

a presumption in the circumstances of this case constituted an abuse of discretion. HB 17-X(66) was *not* adopted by a constitutional legislature; it was adopted by a Legislature illegally apportioned in accordance with a 1963 plan declared unconstitutional by this Court on June 22, 1964. *Swann v. Adams*, 378 U.S. 553. This Court may well consider whether a malapportioned legislature, meeting almost two years after the declaration of its unconstitutionality, could enact apportionment legislation entitled to any presumption of validity.[4]

But in the last analysis, it is not the source of the plan, but the merits of the plan itself, which must determine its constitutionality. In this case, the District Court had before it essentially three alternatives:

(1) A plan which afforded equality of voting rights to all voters in Florida within a maximum variation of only 3.35 percent;

(2) A plan which discriminated between such voters by as much as 18.3 percent and;

(3) A plan by which the deviations contained in HB 17-X(66) could be reduced from 18.3 percent to 11 percent without interference with its basic structure.

[4] The character of the Legislature which enacted HB 17-X(66) is illustrated by its enactment of legislation by a substantial majority, despite the opposition of virtually all urban representatives, permitting small rural counties to permanently freeze the present allocation of certain tax revenues among the counties by bonding them for many decades into the future. This was done despite the Legislature's being specially convened to deal solely with reapportionment. The Governor of Florida, chosen through an electoral process in which all voters have votes of equal weight, vetoed this enactment.

Appellants submit that the District Court abused its discretion when it approved the plan with the greatest deviation on the sole basis of a presumption of validity attaching to the product of a malapportioned, unconstitutional legislature making its eighth attempt. Deviations to the extent contained in HB 17-X (66) could be sustained, if ever, only on a clear showing of necessity derived from some special non-discriminatory, unavoidable circumstance. It should not be here sustained in mere deference to a legislature which in no sense represented the people of the State on a fair and equal basis.

CONCLUSION

For the reasons stated, this Court has jurisdiction of this action and should reverse the order below and order the District Court to reapportion the State of Florida in the manner advocated by the Appellants in their joint plan of July 6, 1965.

Respectfully submitted,

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APPENDICES

APPENDIX A-1

HB 17-X(66)
Final Passage
3/9/1966

A bill to be entitled

An act to provide for the apportionment of the membership of the senate and the house of representatives of the legislature of the state of Florida; prescribing terms of office of members of both houses; providing for continuance in office by members until the general election in November, 1966; providing for elections; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) The representation of the people of the state in the legislature of the state shall continue as now constituted until the general election to be held in November, 1966. Thereafter, the representation of the Florida legislature shall be as set forth in this law.

(2) The representation in the senate of the Florida legislature shall consist of 48 members representing districts and shall be apportioned as follows:

First District — Escambia and Santa Rosa counties.

Second District — Escambia and Santa Rosa counties.

Third District — Okaloosa, Walton and Holmes counties.

Fourth District — Bay, Washington and Gulf counties.

Fifth District — Alachua, Baker, Bradford, Calhoun, Clay, Columbia, Dixie, Franklin, Gadsden, Gilchrist, Hamilton, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Putnam, Suwannee, Taylor, Union and Wakulla counties.

Sixth District — Alachua, Baker, Bradford, Calhoun, Clay, Columbia, Dixie, Franklin, Gadsden, Gilchrist, Hamilton, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Putnam, Suwannee, Taylor, Union and Wakulla counties.

Seventh District — Polk county. The senator elected from the seventh senatorial district in 1964 as it then existed shall serve as the senator from the seventh district until the general election of 1968.

Eighth District — Alachua, Baker, Bradford, Calhoun, Clay, Columbia, Dixie, Franklin, Gadsden, Gilchrist, Hamilton, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Putnam, Suwannee, Taylor, Union and Wakulla counties.

Ninth District — Duval county.

Tenth District — Duval county.

Eleventh District — Pinellas county.

Twelfth District — Indian River, Martin, St. Lucie and Okeechobee counties.

Thirteenth District — Dade and Monroe counties.

Fourteenth District — Citrus, Flagler, Hernando, Lake, Marion, Osceola, Pasco, St. Johns, Seminole, Sumter and Volusia counties.

Fifteenth District—Citrus, Flagler, Hernando, Lake, Marion, Osceola, Pasco, St. Johns, Seminole, Sumter and Volusia counties.

Sixteenth District—Citrus, Flagler, Hernando, Lake, Marion, Osceola, Pasco, St. Johns, Seminole, Sumter and Volusia counties.

Seventeenth District — Dade and Monroe counties.

Eighteenth District — Duval county.

Nineteenth District — Orange county. The senator elected from the nineteenth senatorial district in 1964 as it then existed shall serve as the senator from the nineteenth district until the general election of 1968.

Twentieth District — Orange county.

Twenty-First District — Hillsborough county.

Twenty-Second District — Hillsborough county.

Twenty-Third District — Hillsborough county.

Twenty-Fourth District — Charlotte, Collier, Glades, Hendry and Lee counties.

Twenty-Fifth District — Alachua, Baker, Bradford, Calhoun, Clay, Columbia, Dixie, Franklin, Gadsden, Gilchrist, Hamilton, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Putnam, Suwannee, Taylor, Union and Wakulla counties.

Twenty-Sixth District — Polk county.

Twenty-Seventh District — DeSoto, Hardee, Highlands, Manatee and Sarasota counties.

Twenty-Eighth District — DeSoto, Hardee, Highlands, Manatee and Sarasota counties.

Twenty-Ninth District—Pinellas county.

Thirtieth District—Broward county.

Thirty-First District—Duval county.

Thirty-Second District—Pinellas county.

Thirty-Third District—Palm Beach county.

Thirty-Fourth District—Hillsborough county.

Thirty-Fifth District—Palm Beach county. The senator elected from the thirty-fifth senatorial district in 1964 as it then existed shall serve as the senator from the thirty-fifth district until the general election of 1968.

Thirty-Sixth District—Orange county.

Thirty-Seventh District—Brevard county.

Thirty-Eighth District—Pinellas county.

Thirty-Ninth District—Broward county.

Fortieth District—Dade and Monroe counties.

Forty-First District — Citrus, Flagler, Hernando, Lake, Marion, Osceola, Pasco, St. Johns, Seminole, Sumter and Volusia counties.

Forty-Second District — Dade and Monroe counties. Such district shall consist of all of Monroe county and that part of Dade county which consists of precincts numbered 203, 205, 206, 207, 208, 209, 210, 235, 236, 237, 238, 320, 321, 322, 323, 324, 325 and 326, as they existed and were on file in the office of the secretary of state as of March 2, 1966, and any changes in the precinct boundaries, after March 2, 1966, shall not affect the senatorial district herein created, unless approved by the legislature in a subsequent reapportionment plan. The senator representing the forty-second district shall reside in and be a duly qualified elector of the forty-second district and shall be elected by the people of Dade and Monroe counties.

Forty-Third District—Dade and Monroe counties.

Forty-Fourth District—Dade and Monroe counties.

Forty-Fifth District—Dade and Monroe counties.

Forty-Sixth District—Dade and Monroe counties.

Forty-Seventh District—Dade and Monroe counties.

Forty-Eighth District—Broward county.

(3) The senatorial offices herein created by Section 1 of this act and designated by an even numbered senatorial district number shall be filled at the general election of 1966 for a four (4) year term. The senatorial offices herein created by Section 1 of this act and designated by an odd numbered senatorial district number, except as otherwise provided herein, shall be filled at the general election of 1966 for a two (2) year term ending at the general election of 1968 and thereafter for four (4) year terms. All senators, except as herein provided, and except when vacancies are to be filled for unexpired terms, shall be elected for four (4) year terms.

Section 2. A candidate for the office of state senator shall have been a bona fide resident of the district from which he qualifies for a period of at least six (6) months prior to the qualifying date.

Section 3. (1) The house of representatives of the Florida legislature shall consist of one hundred seventeen (117) members apportioned among the counties according to the latest federal decennial census of population. Until reapportioned according to the census of 1970 the representation in the house of representatives shall be apportioned as follows:

County or Counties	*Number of Members*
Bay and Gulf	2
Escambia	4
Holmes, Walton and Washington	1
Okaloosa and Santa Rosa	2

Jackson and Calhoun	1
Gadsden and Liberty	1
Leon, Wakulla, Franklin	2
Jefferson, Dixie, Taylor, Levy	1
Hamilton, Suwannee, Madison, Lafayette	1
Gilchrist, Putnam, Alachua	3
Union, Bradford, Clay	1
Nassau, Baker, Columbia	1
Duval	11
Citrus, Hernando, Marion, Sumter	2
Flagler, St. Johns	1
Lake, Seminole	3
Pasco	1
Volusia	3
Brevard	3
Orange, Osceola	6
Hillsborough	9
DeSoto, Hardee, Highlands	1
Manatee	2
Polk	4
Sarasota	2
Pinellas	9
Charlotte, Collier, Glades, Hendry, Lee	2
Indian River, Martin, Okeechobee, St. Lucie	2
Palm Beach	5
Broward	8
Dade	22
Monroe	1

(2) Members of the house shall be qualified electors of, reside in and be elected at large by the qualified electors in the county or multi-county districts for which they are chosen unless otherwise provided herein; provided, that

in the multi-county district of Lake and Seminole one representative shall be a resident of Lake County and one member shall be a resident of Seminole county and the other representative shall be a resident of either county; provided that in any multi-county legislative district having two members, with one county thereof having a population in excess of 39,000 and the aggregate population of the remaining counties is in excess of 39,000, one member shall reside in the largest county, and one member shall reside in any one of the remaining counties.

Section 4. Members of the house of representatives are to be elected for two (2) years.

(a) The senatorial offices herein created by Section 1 of this act and designated by an even numbered senatorial district number shall be filled at the general election of 1966 for a four (4) year term. The senatorial offices herein created by Section 1 of this act and designated by an odd numbered senatorial district number, except as otherwise provided herein, shall be filled at the general election of 1966 for a two (2) year term ending at the general election of 1968 and thereafter for four (4) year terms. All senators, except as herein provided, and except when vacancies are to be filled for unexpired terms, shall be elected for four (4) year terms.

Section 5. The provisions of this act are severable and if any word, sentence, paragraph, subsections or sections of the act shall for any reason be held void or unconstitutional by any court of competent jurisdiction, the decision of said court shall not affect or impair the validity of any of the remaining words, sentences, paragraphs, subsections or sections of this act.

Section 6. Candidates for offices created herein shall be nominated in 1966 in the manner provided by law and the offices shall be filled at the general election in November, 1966.

Section 7. For the purposes of conducting the elections and creating the offices to be filled by this act, this act shall take effect immediately upon becoming a law; but for the purposes of repeal of the law providing for the apportionment of the legislature under chapter 10, Florida Statutes, as it existed on June 1, 1965, this act shall take effect on the Tuesday after the first Monday, November, 1966.

APPENDIX B-1

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 186-62-M-Civil-DD

RICHARD H. M. SWANN,

Plaintiff,

v.

TOM ADAMS, Secretary of State of the State of Florida, et al.,

Defendants.

Before JONES, Circuit Judge, and McRAE and DYER, District Judges

PER CURIAM

Following the order of the United States Supreme Court that a valid reapportionment plan be made effective for the 1966 elections, see Swann v. Adams, 34 U.S.L. Week 3291 (U.S. Feb. 25, 1966), the Florida Legislature met in special session in March 1966 and passed a 48-senator, 117-representative plan. The state urges this court to accept that plan, arguing that it meets in all respects the federal constitutional one-man, one-vote requirement laid down in Reynolds v. Sims, 377 U.S. 533 (1964).

Plaintiff's major contention is that the variations in

population per representative and senator are too great. Mathematical exactness or precision is not required, of course, but apportionment must be substantially on a population basis. Various tests have been used to analyze how close other plans have come to the ideal: the percentage deviation of a district's population from the average population per district, the population ratio of the largest district to the smallest district in the state, and the minimum percentage of persons in the state represented by a majority of the legislature.

Applying these tests to the proposed Florida plan, we find that the senate districts range from 87,595 to 114,053 in population per senator, or from 15.09% over-represented to 10.56% underrepresented, creating a ratio of 1.30:1 between the largest and smallest districts. The deviation from the average population per senator is greater than 15% in only 1 district and is greater than 10% in 11 other districts. The minimum percentage of persons that could elect a majority of 25 senators would be 48.38%.

The suggested house districts range from 34,584 to 48,785 in population per representative, or from 18.28% overrepresented to 15.27% underrepresented, creating a population ratio of 1.41:1. The deviation from the average is greater than 15% in 7 districts and is greater than 10% in 22 other districts. The minimum percentage of persons that could elect a majority of 58 representatives is 47.79%.

Taken individually these statistics mean little, but collectively they tend to indicate that the legislature's proposed plan is constitutionally valid. Compare WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y.), *aff'd per*

curiam, 382 U.S. 4 (1965). Such departures as there are from the ideal are not sufficient in number or great enough in percentages to require an upsetting of the legislative plan. More important, what deviation there is does not discriminate to any great extent against any section of the state or against either rural or urban interests.

Other aspects of the proposed plan also have come under attack. First, three senators would not be required to run for reelection in 1966, but would be allowed to finish their present terms, which expire in 1968. Since these senators were elected in districts that are identical in territory to their districts under the proposed plan, we find no federal constitutional infirmity in allowing these senators to be continued in office. Second, one senate and six house seats are subject to residency requirements. We upheld such arrangements in a previous order and see no reason to reach any different result here. *Accord*, Fortson v. Dorsey, 379 U.S. 433 (1965). Finally, the proposed plan contains several multicounty, multirepresentative or multisenator districts. However unwise and undesirable these may be, we find nothing in their nature that violates the federal constitution. See Fortson v. Dorsey, *supra*.

An order will be entered herein in accordance with the present opinion.

ORDER

It is, upon consideration,

ORDERED AND ADJUDGED:

The plan of apportionment of the Florida Legislature, as found in HB 17-X(66), enacted in March 1966, meets federal constitutional standards and is accepted by this court as the standard to be used in selecting members for the 1967 session of the Florida Legislature.

DONE AND ORDERED this 18th day of March, 1966.

WARREN L. JONES
United States Circuit Judge

WILLIAM A. McRAE, JR.
United States District Judge

DAVID W. DYER
United States District Judge

APPENDIX B-2

SUPREME COURT OF THE UNITED STATES

SWANN v. ADAMS, et al.

Appeal from the United States District Court for the Southern District of Florida.

No. 297. Decided June 22, 1964.

PER CURIAM.

The judgment below is reversed. *Reynolds v. Sims*, __ U.S. __. The case is remanded for further proceedings consistent with the views stated in our opinions in *Reynolds v. Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds*.

Mr. Justice Clark would reverse on the ground stated in his opinion in *Reynolds v. Sims*, __ U.S. __.

Mr. Justice Stewart would remand for further proceedings consistent with the views expressed in his dissenting opinion in *Lucas v. Colorado General Assembly* and *WMCA, Inc. v. Lomenzo*, __ U.S. __.

Mr. Justice Harlan dissents for the reasons stated in his dissenting opinion in *Reynolds v. Sims*, __ U.S. __.

APPENDIX B-3

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 186-62-M-CIVIL-DD

RICHARD H. M. SWANN,
Plaintiff,

v.

TOM ADAMS, Secretary of State of the State of Florida, et al.,
Defendants.

Before JONES, Circuit Judge, and McRAE and DYER, District Judges

PER CURIAM:

Before this Court for determination is the question of the constitutional validity of a statute of Florida enacted at a 1965 Special Session of its Legislature, designated as HB 19-XX, providing for the apportionment of the membership of the Florida State Senate and House of Representatives. A copy of the statute is annexed as an appendix. The statutory apportionment as made by HB 19-XX has been subjected to several grounds of attack. It is urged that the provisions of Section 1(3) are invalid. This Section continues in office those senators, whose districts have been abolished, for the remainder of

the term to which they were elected, which would be until the general election of November, 1968. It is contended that the provisions of Section 1(5) of the Act cannot be upheld. This Section requires that where two or more counties are assigned more than one senatorial district, no two senators representing any district comprised of such counties shall reside in the same county until each county has a senator residing and qualified to vote therein, It is said that the subdistricting of Dade County but not other counties is an unwarranted discrimination. The most serious of the questions presented are those which deal with the one man-one vote, equality of representation principle. Other issues are raised but are, in the Court's opinion, without merit and without sufficient plausibility to require discussion.

It seems apparent that the carrying forward into a newly constituted legislature those senators, previously elected, who no longer have a constituency cannot be upheld. To permit these senators to serve who will no longer be representing any electors would result in giving an added weight to the votes of the electors of those areas from which they were originally chosen. To eliminate this inequality the Act (HB 19-XX) must be modified by the deletion of Section 1(3).

It is not shown that Section 1(5) is unconstitutional. The effect of this Section is to prevent the election of two or more senators from any county until a senator has been elected from each county where two or more counties are combined in two or more senatorial districts. By way of example, Duval County, with a 1960 population of 455,411, is combined with Nassau County, with a population of 17,189, and St. John's County, with a population of 30,034,

in senatorial districts numbered 16, 18, 21, 31, 33 and 58. Thus it is provided that Nassau, with about three percent of the population of the districts and St. John's, with about six percent of the population of the districts, will each have one-sixth of the senatorial representation from the multi-county districts. The provision relates to residence of the senators and not to the voting strength of those who elect them. Although each county of the multi-county districts is entitled to have a senator resident within it, the tenure of such senators depends upon the district-wide electorate. Such senator represents, not the county where he resides, but the district. The weight of the voter in the most populous of the multi-county districts (Duval County in the stated example) for senators to represent him is approximately equal in weight to voters in the less populous counties. This question is the same as was decided in Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed. 2d 401, where several districts were within a county. It has not been suggested that the residence requirement in the Florida statute was intended to minimize or cancel out the voting strength of racial or political elements of the voting population, or that it would have such effect. Cf. Fortson v. Dorsey, supra.

Dade and Monroe Counties comprise six senatorial districts under the statute. Two districts, numbered 12 and 39, are composed of that part of Dade County comprising the third congressional district as it existed on June 1, 1965. Two other districts, numbered 40 and 41, are made up of that portion of Dade and Monroe Counties comprising the fourth congressional district as it existed on June 1, 1965. In no other instance are legislators elected from districts with other boundaries than county lines. It is asserted that this is an illegal discrimination.

It has not been made to appear that these districts were set up for the purpose of lessening or enhancing the weight of the votes of the citizens residing in these districts, or that it was designed to or did affect the voting strength of any racial or political group. This being so, it cannot be said that the Federally protected right of equality of voting strength has been violated. If there has been any resulting injustice it is a political one for which a political remedy should be sought.

We are now brought to the problem as to whether the allocation of senators and representatives among the citizens of the State is so disproportionate as to amount to the invidious discrimination which has been condemned as violative of the Equal Protection Clause. Efforts have been made by some of the amici curiae to defend the legislative enactment, and to persuade us that the statutory departures from the equal population principle are within permissible limits. The Attorney General of Florida, with commendable candor, concedes that the standard has not been met, but urges that we should once more afford the State of Florida, acting through its legislature, an opportunity to put its legislative house in order. If this can be done we think it should be done. In attempting to solve problems of the legislative apportionment factors other than one person-one vote may loom large. Adjacent counties, neither of which has a population sufficient to have a senator or representative by itself, may be so wholly different in economic character that it would be inadvisible to unite them for the purpose of legislative representation. We can recognize that such problems can and do exist but we have no claim to the competence required to solve them. It is the belief of the Court that the Florida legislature, as it will be constituted under

the statute with the Section 1(3) senators eliminated, will have a majority such as will permit, if there be the will to do so, a correction of the malapportionment which exists under the Act. In accepting the legislative enactment as an interim measure, the Court does not overlook the prior indulgence which had been granted but we are reminded that our prior order was entered before the guidelines of Reynolds v. Sims, supra, and other decisions of the Supreme Court had been drawn. In affording a further opportunity to the Florida legislature to adopt a constitutionally acceptable apportionment, we have the confident hope that there will be a recognition, by the legislative bodies, of the paramount necessity of conforming to the constitutional requirement that "both houses of a state legislature must be apportioned on a population basis," and that the "state make an honest and good faith effort to construct districts in both houses of its legislature, as nearly of equal population as is practicable." Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L. Ed. 2d 506. Precise exactness cannot, of course, be achieved but only such minimal departures as necessity demands will be permitted. Variations are to be sanctioned only when they cannot be avoided. We do not think it can be assumed that the fifteen percent variance allowed in Tombs v. Fortson, N.D. Ga. 1965, 241 F. Supp. 65, establishes a rule of tolerance that will be followed as a legal principle. If the Florida legislature does not adopt a valid plan of apportionment then this Court must do so; and so that it may, if need be, do so, jurisdiction will be retained. No further action will be taken by the Court until the adjournment of the next regular session of the legislature or, in the event it shall not have enacted reapportionment legislation, until the lapse of the time required to convene and hold a legislative special session for reapportionment.

ORDER

The premises considered, it is ORDERED, ADJUDGED and DECREED that:

1. The plan of apportionment of the Florida legislature, as made by HB 19-XX enacted at its special session in 1965, in both the Senate and House of Representatives does not meet the requirements of the Equal Protection Clause of the Federal Constitution as construed as applied in Reynolds v. Sims, supra, and other decisions of the Supreme Court. The apportionment made by said statute, as herein modified, is approved as an interim plan for a period ending sixty days after the adjournment of the 1967 regular session of the Florida legislature;

2. The provisions of Section 1(3) of said statute are in violation of the Equal Protection Clause of the Federal Constitution. The statute, and the plan of apportionment thereby enacted, are modified by deleting and striking therefrom the aforesaid Section 1(3); and

3. The Court retains jurisdiction of this cause until such time as there shall be an adjudication that a valid plan of legislative apportionment has been enacted, or until such a plan has been made effective by a decree of this Court.

DONE, ORDERED and DECREED this 23rd day of December, 1965.

Warren L. Jones
United States Circuit Judge

William A. McRae, Jr.
United States District Judge

David W. Dyer
United States District Judge

APPENDIX B-4

SUPREME COURT OF THE UNITED STATES

SWANN et al. v. ADAMS et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 973. Decided February 25, 1966.

PER CURIAM.

We previously remanded this case to the District Court for further proceedings in light of *Reynolds* v. *Sims*, 377 U. S. 533, and the other cases relating to legislative reapportionment decided with *Reynolds*, 378 U. S. 553. The District Court deferred action until the conclusion of the legislative session which convened on April 6, 1964, stating that it would reconsider its decision should the Florida Legislature fail to effect a valid reapportionment by July 1, 1965.

A reapportionment law was passed by the legislature on June 29, 1965. On July 6 the appellants filed a joint petition asking the District Court to declare the newly enacted plan unconstitutional and proposing an alternative plan. The District Court did not take action until October 5 when it ordered oral argument for November 2, 1965. On December 23 the District Court concluded that the newly passed reapportionment plan failed to meet the requirements of the Equal Protection Clause of the Federal Constitution as construed and applied in *Reynolds* v. *Sims* . . . ."

Although the District Court concluded that the plan did not comport with constitutional requirements, it approved the plan (making only minor changes) on an interim basis. Its approval was limited to the period ending 60 days after the adjournment of the 1967 session of the Florida Legislature.

We have no occasion to review the District Court's determination that the legislative reapportionment plan fails to meet constitutional standards. Indeed, Florida does not contend that the District Court erred in this regard, having conceded below that the plan was constitutionally deficient. We hold, however, that in approving the plan on an interim basis, the District Court erred. This litigation was commenced in 1962. The effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969. While recognizing the desirability of permitting the Florida Legislature to itself determine the course of reapportionment, we find no warrant for perpetuating what all concede to be an unconstitutional apportionment for another three years.

We reverse and remand to the District Court so that a valid reapportionment plan will be made effective for the 1966 elections.

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.